BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRED WHITSON	)	
Claimant	)	
	)	
VS.	)	
	)	
NW ROGERS CONSTRUCTION	)	
Respondent	)	Docket No. 1,044,832
	)	
AND	)	
	)	
MISSOURI EMPLOYERS MUTUAL	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 7, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Michael J. Joshi, of Lenexa, Kansas, appeared for claimant. D'Ambra M. Howard, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant was not an employee of respondent but was, instead, an employee of Mantles and More, respondent's subcontractor. Further, the ALJ found that claimant failed to prove that he was injured in the course and scope of his employment on February 20, 2009, and also that he failed to prove that he reported the injury to respondent within 10 days. Accordingly, the ALJ denied the requested benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 6, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests that the ALJ's Order be reversed, arguing that he was an employee of respondent, that the evidence proved he was injured by an accident that

arose out of and in the course of his employment with respondent, and that he gave respondent timely notice of his accident.

Respondent asserts that the ALJ correctly determined that claimant was not its employee but was, instead, employed by Mantles and More. Further, respondent argues that claimant did not meet his burden of proving that his alleged injury arose out of and in the course of his employment with respondent, and also argues that claimant failed to provide it with timely notice of his alleged injury. Further, respondent requests that the ALJ's finding that claimant was not a credible witness should be given deference by the Board.

The issues for the Board's review are:

(1) Was claimant an employee of respondent?

(2) Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent?

(3) If so, did claimant give respondent timely notice of his accidental injury?

FINDINGS OF FACT

Claimant testified that he was a carpenter employed full time by respondent. He agreed, however, that he only worked a total of 12 days from January 28 to February 20, 2009, when he was working at a job site at a Masonic Temple. He also said that if the wage documentation showed that at no time did he work 8 hours per day, he would not disagree with that. Claimant entered as an exhibit copies of two of his pay checks that had been issued by respondent. He said that respondent had other jobs and liked his work, and he was going to continue working there.

Claimant denied that he worked for his father or his father's business, Mantles and More, a subcontractor of respondent. Mantles and More does not have workers compensation insurance coverage. He testified that he did not perform any work for any other company during the time he worked for respondent at the Masonic Temple site. He said that his father got him the job with respondent. He told his father to tell respondent he would work for them for $25 per hour. He admits he never met with anyone at respondent before he started working at the job site.

Claimant testified that on February 20, 2009, he was injured while working for respondent when he bent over to pick up a cabinet and felt a twinge in his back. He said his father was on the other end of the cabinet. Claimant said he told his father he had hurt his back and would have to sit down. He went outside and sat in his car. Later, he returned and tried to work, but the pain started shooting down his leg. Claimant said he walked outside, where he saw Darren Rheuport, respondent's job site superintendent.

Claimant said he told Mr. Rheuport he had injured his back and would not be able to work the rest of the day. Claimant has not been able to return to work at respondent because of his injury.

Claimant had a work-related back injury in Missouri in the 1990s. He said he had not sought any medical treatment from a doctor with respect to his back condition since 1995 until this injury. He said he had problems with his low back off and on since that previous accident.

A week after the accident, claimant realized he was not getting any better, and he went to Truman Medical Center (Truman) for treatment. He told the personnel at Truman that he had problems with his low back for a long time. He also told the personnel at Truman that his back had been bothering him for the last four or five days. He claims he also told them that he had been hurt on the job when he was attempting to lift a cabinet, although that is not mentioned in the record. The history section of Truman's records has a blank spot which apparently indicates that something was dictated but was not clear and was not transcribed.

Claimant admits that he did not contact respondent before seeking treatment at Truman. He said that respondent knew about it, however, because his father told Mr. Rheuport the next Monday.

While at Truman, claimant was given medication for the pain. However, the pain radiating down his leg became worse, so on March 28, 2009, he went to the emergency room at Lafayette Regional Medical Center (Lafayette). The medical records from Lafayette indicate that he complained of severe low back pain that had started a month earlier when he was lifting a cabinet at work. He told the Lafayette personnel that he had a previous herniated disc. He was admitted to the hospital, where he was given an epidural and also had an MRI.

In 1995, claimant filed a workers compensation claim for a back injury that had occurred on August 29, 1995. That case, however, was dismissed because claimant gave some false testimony pertaining to his level of income. He was charged criminally in that matter, and as a result, he was placed on probation.

Claimant's father, Phil Whitson, testified that claimant was an employee of respondent and was not employed by him or his business, Mantles and More. He testified that on February 20 he and claimant were lifting a cabinet when claimant said, "Boy, that hurt."[1] He said that claimant then left and went to sit in his truck. He said that claimant did not return and try to work. Mr. Whitson said later he went out to the truck and claimant told him he had run into Mr. Rheuport. He did not know if claimant reported the injury to

[1] P.H. Trans. at 42.

Mr. Rheuport. Mr. Whitson said he worked on the job for three or four more days until the job was finished, but claimant did not work anymore after that day. Mr. Whitson testified that the next Monday, Mr. Rheuport asked him how claimant was doing, and he told him that claimant was still down in his back. Mr. Rheuport, however, testified that he did not have a conversation with Mr. Whitson about claimant the Monday after the alleged accident, and he would not have asked about claimant's condition because he did not know he had been hurt.

Mr. Whitson testified that he did not know that he was a subcontractor for respondent because he worked by the hour. He said he had not been provided a subcontract outlining the work that was needed.

Mr. Rheuport testified that Mantles and More, a company owned by Phil Whitson, was a subcontractor for respondent's project. Mantles and More was contracted to hang doors and hardware and do trim work. He said respondent had paperwork setting out the agreement between respondent and Mantles and More. That agreement allowed Mr. Whitson to bring a second man with him, and Mr. Whitson brought his son, the claimant. Mr. Rheuport identified invoices submitted by Mantles and More identifying the number of hours and days worked by Mr. Whitson and claimant.

Mr. Rheuport testified that he was 100 percent certain that Mantles and More was working on other projects during the same period of time Mr. Whitson and claimant were working at the job site for respondent, and that both Mr. Whitson and claimant worked on those other projects. He said occasionally he was told by Mr. Whitson that he and claimant could not come in or were leaving early because of other things they had going on. Claimant testified that although his father had other projects going at that time, he was not involved in those projects.

Mr. Rheuport testified that he was present at the job site on February 20, 2009. As part of his duties, he monitors work-related injuries suffered on the job site. This would include respondent's employees and employees of subcontractors. He said that claimant never reported to him that he had suffered a work-related injury on February 20, 2009. Nor was he told about claimant's alleged injury by claimant's father. Mr. Rheuport did not observe claimant exhibiting signs of injury, discomfort or pain on that day. Later in the day, he was informed by claimant's father that claimant had left at midday. Mr. Whitson did not tell him claimant left because he had been injured.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

K.S.A. 44-503 extends the application of the Workmen's Compensation Act to certain individuals and entities who are not the immediate employers of an injured worker.[5] The purpose of the statute is to give employees of a subcontractor a remedy against a principal contractor and to prevent employers from evading liability under the Act by contracting with outsiders to do work which they have undertaken as a part of their trade or business.[6] The statute provides in part:

> (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the

---

[2] K.S.A. 2008 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] *Id.* at 278.

[5] *Hollingsworth v. Fehrs Equip. Co.*, 240 Kan. 398, 402, 729 P.2d 1214 (1986).

[6] *Bright v. Cargill, Inc.*, 251 Kan. 387, 393, 837 P.2d 348 (1992); *Atwell v. Maxwell Bridge Co.*, 196 Kan. 219, 221, 409 P.2d 994 (1966).

> principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.
>
> . . . .
>
> (g) . . . . In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation.

There is a two-part test to determine whether the work which caused the injury is part of the principal's trade or business, *i.e.* (1) is the work being performed by the injured employee necessarily inherent in and an integral part of the principal's trade or business; or (2) is the work being performed by the injured employee such as is ordinarily done by employees of the principal? If either of the foregoing questions is answered in the affirmative, the work being done is part of the principal's trade or business, and the injured employee is a statutory employee of the principal.[7]

K.S.A. 44-520 states in part:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

---

[7] *Hanna v. CRA, Inc.*, 196 Kan. 156, 159-60, 409 P.2d 786 (1966).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

ANALYSIS

The ALJ found that claimant was not a direct employee of the respondent, NW Rogers Construction, but was instead an employee of its subcontractor, Mantles and More. This Board Member agrees with that determination. But because the subcontractor had no workers compensation insurance coverage, claimant may proceed against the principal. The work performed by claimant was part of respondent's trade or business. Therefore, pursuant to K.S.A. 44-503, claimant may proceed against respondent for workers compensation benefits.

Notice to the subcontractor constitutes notice to the principal. Therefore, if claimant reported his injury to his father, Phil Whitson, on the day of the accident, then notice was timely. But the ALJ determined claimant was not a credible witness and rejected both his and his father's testimony that the accident occurred on February 20, 2009, while working on respondent's job site. There were simply too many inconsistencies. Moreover, the testimony of claimant and his father was directly contradicted by the testimony of Darren Rheuport.

This Board Member considers it appropriate to give some deference to the ALJ's determination of the credibility of the witnesses who testified in person before him. Furthermore, the ALJ's conclusions are well supported by the record. The ALJ's conclusion that claimant's injury did not arise out of or occur in the course of his employment with respondent is affirmed.

CONCLUSION

Claimant was an employee of a subcontractor of respondent. But claimant has failed to prove that he suffered his personal injury by an accident on February 20, 2009, while in the course of his employment as an employee of a subcontractor of respondent.

---

[8] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2008 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the denial of compensation by Order of Administrative Law Judge Kenneth J. Hursh dated May 7, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2009.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Michael J. Joshi, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge